BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD O. GATES Claimant VS. **BRIGHTON PAINTING COMPANY** Respondent AND **CNA INSURANCE COMPANY** Insurance Carrier	)	Docket No. 181,593

ORDER

On June 18, 1996, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge Michael T. Harris on April 17, 1996, came regularly on for oral argument.

APPEARANCES

Claimant appeared in person and by his attorney, Larry T. Hughes of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Eric T. Lanham of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether the claimant's contract of employment was made within the state of Kansas.

(2) If so, whether the contract of employment specifically provided that the Kansas Workers Compensation Act did not apply to the injury involved in this claim.

(3) If the Kansas Workers Compensation Act does apply to the injury involved in this case, whether the nonresident respondent/employer has sufficient minimum contact with the state of Kansas to warrant exerting personal jurisdiction over it.

In its brief, respondent argued the constitutionality of K.S.A. 44-506. At oral argument respondent's attorney made it clear that they were not claiming K.S.A. 44-506 was unconstitutional but instead arguing that the long-arm statute in Kansas must require minimum contacts in order to satisfy the proper constitutional standards. This dispute is included in issue No. (3) above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a contract painter, while in Texas responded to an ad in a Houston newspaper by telephoning respondent in the Virgin Islands. During this initial telephone conversation, between Texas and the Virgin Islands, claimant and respondent discussed whether claimant was willing to come to the Virgin Islands and work for respondent painting certain structures. Specific terms of the contract, including the benefits and claimant's hourly rate of pay, were discussed at that time. Rick Eveans contends he read the employment contract to claimant over the telephone during that conversation. Claimant has no memory of this although he does agree that certain terms of the contract were discussed.

After this initial telephone conversation claimant traveled to Florida, picked up his vehicle and transported it to Topeka, Kansas, to his mother's residence. While there, he had a second telephone conversation with respondent at which time claimant alleges he accepted the terms of the employment contract with respondent. Respondent contends the second telephone contact was merely intended to allow claimant to provide respondent with the location where the plane tickets were to be sent in order for claimant to travel to the Virgin Islands.

It is undisputed that respondent had no contact with the state of Kansas from 1984 forward with the exception of this one telephone call. Respondent did not advertise in the state of Kansas and had not done business in the state of Kansas since 1983. Claimant acknowledges he became aware of claimant's ad while in Texas, reading a Houston, Texas, newspaper.

Claimant, after receiving the airplane tickets flew to the Virgin Islands. While in the Virgin Islands he began his employment with the respondent and, either at the time he arrived in the Virgin Islands or shortly thereafter, he was presented the actual contract

which he signed. A specific clause in the contract dealing with workers compensation benefits reads as follows:

> "Your right to benefits will be solely, and exclusively governed and provided by the provisions of Title 24, Chapter 11 of the Virgin Islands Code pertaining to Worker's Compensation and the Government Insurance fund."

Issue No. (1): Whether claimant's contract of employment was made within the state of Kansas.

There is a significant dispute between claimant and respondent as to where the actual acceptance of this contract occurred. Respondent argues acceptance was made during the first telephone conversation while claimant was in Houston, Texas. Claimant, alleges no acceptance was made at that time, arguing the actual acceptance of the contract occurred during the telephone conversation when claimant was in Topeka, Kansas. It is significant that in workers compensation litigation the burden of proof is upon claimant to establish his right to an award of compensation by proving the various conditions upon which his right to a recovery depends by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 44-508(g). *See* also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In reviewing the testimony of both the claimant and Rick Eveans, president of respondent's company, the Appeals Board finds Mr. Evean's testimony to be more persuasive. Mr. Eveans described in detail the information discussed between claimant and himself during the telephone call while claimant was in Houston, Texas. Mr. Eveans further discussed the fact that the actual contract itself was read to claimant over the telephone during this conversation. The contents of the conversation between the parties, while claimant was in Topeka, Kansas, are limited and sketchy and, with the exception of the actual start date for claimant, did not appear to contain anything of substance relating to the contract.

A case while, not directly on point but similar, is Neumer v. Yellow Freight System, Inc., 220 Kan. 607, 556 P.2d 202 (1976). In Neumer the claimant traveled to the state of Missouri and negotiated a contract with Yellow Freight System, Inc. After all the documentation was completed claimant was told by respondent's representative that "[w]ell, if everything's all right, we will call you." Claimant was then contacted by telephone at his residence in Kansas and told to be at work the following Monday morning. Respondent's representative testified that he had already decided to hire claimant and had communicated this decision to claimant prior to the telephone call. Claimant denied that fact. The determinative factor was when the contract was actually made; i.e., "where the last act necessary for its formation is done." *Id*. at 608. The Court found that even under the claimant's version the function of the telephone call was simply to advise him when to come to work and was not actually an offer of a job. Claimant's understanding that he would be hired "if everything's all right" was not sufficient to cause the telephone call to Kansas to be the last act necessary for the formation of the contract.

The facts in this case are similar to Neumar in that significant details of the contract between claimant and respondent were discussed during the Houston telephone conversation. As such, the Appeals Board finds the contract between claimant and respondent was actually formed while claimant was in Houston, Texas. The Appeals Board, in so finding, reverses the Award of the Administrative Law Judge.

The above finding renders moot issues numbered (2) and (3).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Michael T. Harris dated April 17, 1996, should be and is hereby reversed, and claimant, Ronald O. Gates, is denied an award against Brighton Painting Company and CNA Insurance Company for an injury alleged to have occurred on or about June 25, 1993.

The costs associated with the administration of the Kansas Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid directly as follows:

Special Administrative Law Judge Michael T. Harris	$150.00
Nora Lyon & Associates	
Regular Hearing Transcript	$ 69.40
Preliminary Hearing Transcript	$147.20
Gore & Perry Reporting	
Deposition of Rick Eveans	Unknown
Metropolitan Court Reporters	
Deposition of Ronald Gates	Unknown
Appino & Achten Reporting Service	
Preliminary Hearing Transcript	Unknown

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Larry T. Hughes, Topeka, KS
Eric T. Lanham, Kansas City, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director